No. 14-556, 14-562, 14-571, 14-574

# In the Supreme Court of the United States

JAMES OBERGEFELL, et al., *Petitioners*,

v.

RICHARD HODGES, et al., *Respondents*.

[Additional Case Captions Listed Inside Front Cover]

*On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## BRIEF *AMICUS CURIAE* OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS IN SUPPORT OF RESPONDENTS AND SUPPORTING AFFIRMANCE

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v.

RICK SNYDER, et al., *Respondents*.

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GREGORY BOURKE, et al., *Petitioners*,

v.

STEVE BESHEAR, et al., *Respondents*.

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## INTEREST OF *AMICUS*

The United States Conference of Catholic Bishops ("USCCB" or "Conference") is a nonprofit corporation, the members of which are the active Catholic Bishops of the United States.[1] The USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the nature of marriage. Values of particular importance to the Conference implicated in these cases include the promotion and defense of marriage, the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of the nation's jurisprudence on these issues.

We submit this brief in support of Respondents, and we urge this Court to uphold the State marriage laws challenged in these cases.

## SUMMARY OF ARGUMENT

The State laws at issue here encourage and support the union of one man and one woman as husband and wife, as distinct from other

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* state that they authored this brief, in whole, and that no person or entity other than *amicus* made a monetary contribution toward the preparation or submission of this brief. The Clerk of this Court has noted on the docket the blanket consent of all Respondents to the filing of *amicus* briefs. Written consent from counsel for Petitioners to the filing of this *amicus* brief has been filed with the Clerk.

interpersonal relationships, by conferring upon such unions a unique set of benefits. There are at least two reasons for doing so.

*First*, as a matter of simple biology, the sexual union of one man and one woman is the only union capable of creating new life. A home with a mother and a father is the optimal environment for raising children, an ideal that State law encourages and promotes. Given both the unique capacity for reproduction and the unique value of homes with a mother and father, it is reasonable and just for a State to treat the union of one man and one woman as having a public value that is absent from other intimate, interpersonal relationships. No other institution joins together persons with the natural ability to have children, to assure that any such children are properly cared for by their own parents. No other institution ensures that children will at least have the opportunity of being raised by their mother and father together.

*Second*, encouraging and supporting a permanent bond of marriage between a father and mother promotes their interests. More than a quarter of the Nation's children currently live with only one birth parent. Government support for a marital bond between mothers and fathers serves the interest of reducing, or preventing further increases in, the incidence of single parenthood and the consequent burdens it places upon the custodial parent (usually the mother) and the public fisc.

The legal definition of marriage as the union of one man and one woman is not based on hatred, bigotry, or animus against any class of persons. Nor

does it create a classification based upon mere inclination. Rather, the definition of marriage distinguishes and specially supports certain forms of *conduct*. While the law may not draw classifications based upon mere thoughts, beliefs, or inclination, it can and routinely does distinguish between types of conduct. Here as elsewhere, the mere fact that a law declines to support certain conduct does not imply hatred of the person who might engage in that conduct.

Sexual relations between a man and a woman are of a type capable of producing children; sexual acts between persons of the same sex are not. Because sexual acts between a man and a woman have different practical consequences, the government can reasonably distinguish them in law from same-sex sexual acts. In particular, by the law of marriage, government has encouraged a permanent bond between a man and a woman as husband and wife to ensure both that children born of their union will have both a mother and father, and that neither mother nor father will be left to serve as sole custodial parent. Because sexual conduct between persons of the same sex never results in children, legal reinforcement of a permanent bond between them does not serve the same interests. In this context, like any other, the government is not required to treat things that are different in relation to its asserted interests as if they were the same. There is no bigotry in treating genuinely different things differently.

State laws defining marriage as the union of one man and woman are not rendered invalid because they overlap with, or are informed by, religious or

moral viewpoints. Many, if not most, of the significant social and political movements in our Nation's history were motivated by religious and moral considerations. Moreover, advocacy to *redefine* marriage to include two people of the same sex is itself motivated and informed by religious and moral arguments (albeit ones that are, in our view, flawed). If it were impermissible to make moral arguments in *favor* of marriage as the union of one man and woman, then moral arguments *against* that definition would be equally out of bounds.

A State's decision not to extend the unique benefits and protections of legal marriage to persons in same-sex relationships does not mean that such relationships, even those that would describe themselves as "marriages," are "banned" or "illegal." This Court has held that laws *forbidding* private, consensual, homosexual conduct between adults lack a rational basis; but it does not follow that States have a constitutional duty to *support* such conduct, which is precisely what would occur if the definition of marriage were expanded to encompass such conduct.

Finally, redefining marriage as a matter of constitutional law would needlessly create church-state conflict for generations to come. Because marriage so pervades civil and social life, these conflicts will similarly pervade, extending much farther than other categories of conflict that might be considered analogous. In States that have redefined marriage, disputes have already arisen that provide a glimpse of what is to come if this Court were to declare that such redefinition is mandated nationwide by the U.S. Constitution. Reversal of the

judgment below would embroil this Court (and lower courts) in a series of otherwise avoidable disputes—pitting claims of constitutional right squarely against one another—for decades to come, until one or the other is diminished.

## ARGUMENT

### I. Like So Many Others, the Catholic Bishops Support the Legal Definition of Marriage as the Union of One Man and One Woman Out of Love, Justice, and Concern for the Common Good.

The State laws challenged here define marriage as the union of one man and one woman to encourage and support that particular relationship, as distinct from a host of other possible interpersonal relationships, mainly for the benefit of children and of the two parents who bring them into being, especially mothers. Government support and encouragement for such unions have cross-cultural roots as old as recorded history. As the antiquity and near-universality of such laws suggest, there are numerous reasons for government to uniquely affirm man-woman unions as "marriage." We highlight two.

#### A. When It Uniquely Reinforces the Union of One Man and One Woman, the Law Furthers the Interests and Well-Being of Children.

As a matter of simple biology, only sexual relationships between men and women can lead to the birth of children by natural means. As these relationships alone may generate new life, the state

has a distinct interest in reinforcing these relationships alone, particularly to assure responsible childbearing and the protection of children's interests. *See, e.g.*, *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942) ("[m]arriage and procreation are fundamental to the very existence and survival of the race."); *see also* William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 166 (Spring 2004) ("The state has an interest in all opposite-sex couples because all are theoretically capable of procreation.").[2] That childbearing opportunities inherent in the marital union are sometimes unrealized does nothing to undermine the immense societal value of a law recognizing the unique status of such unions.[3]

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[2] *Citizens for Equal Prot.* v. *Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006) (citing "responsible procreation," or the interest in "encourag[ing] heterosexual couples to bear and raise children in committed marriage relationships," as one of two reasons for upholding Nebraska marriage amendment against a federal equal protection challenge); *Adams* v. *Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (upholding Colorado marriage statute against federal due process and equal protection challenges on the ground that "the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised"), *aff'd*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982); *Standhardt* v. *Superior Court of Arizona*, 77 P.3d 451, 463-64 (Ariz. Ct. App. 2003) (defining marriage as the union of one man and one woman advances the State's "interest in encouraging procreation and child-rearing within the marital relationship").

[3] *Adams*, 486 F. Supp. at 1124-25 ("The alternative" to defining marriage to mean the union of one man and one woman, even if the couple is infertile or not planning to have children, "would be to inquire of each couple, before issuing a marriage license, as

The optimal environment for the raising of children is a family structure in which both a mother and a father are present and bonded together.[4] Every child has a mother and a father, and only marriage, understood as the union of one man and one woman, assures that children will have the opportunity to be raised by both a mother and a father.[5] A mother and

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to their plans for children and to give sterility tests to all applicants, refusing licenses to those found sterile or unwilling to raise a family. Such tests and inquiries would themselves raise serious constitutional questions."), citing *Griswold* v. *Connecticut*, 381 U.S. 479, 485-86 (1965).

[4] *See* Pope Francis, Address to Participants in the International Colloquium on the Complementarity Between Man and Woman (Nov. 17, 2014) ("Children have a right to grow up in a family with a father and a mother capable of creating a suitable environment for the child's growth and emotional development."), http://w2.vatican.va/content/francesco/en/speeches/2014/november/documents/papa-francesco_20141117_congregazione-dottrina-fede.html.

[5] *Citizens for Equal Prot.*, 455 F.3d at 867-68 (citing the notion that a husband and wife are "the optimal partnership for raising children" as one of two bases for rejecting equal protection challenge to Nebraska marriage amendment); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677 (Tex. App. 2010) (listing cases that have rejected equal protection challenges to marriage as the union of one man and one woman, and noting that "[i]t is reasonable for the state to conclude that the optimal familial setting for the raising of children is the household headed by an opposite-sex couple"); *id.* at 678 ("The state also could have rationally concluded that children are benefited by being exposed to and influenced by the beneficial and distinguishing attributes a man and a woman individually and collectively contribute to the relationship."); *Hernandez* v. *Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his

father each bring something unique and irreplaceable to child-rearing that the other cannot.[6] It is precisely such unions, which house the unique and irreplaceable gifts of mother and father, upon which the Respondents have conferred the name and special legal status of "marriage."

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or her eyes, every day, living models of what both a man and a woman are like.").

[6] *See, e.g.*, Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752 (2012) (finding that children raised by married biological parents fared better in a range of significant outcomes than children raised in same-sex households); David Popenoe, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY, 146 (1996) ("The burden of social science evidence supports the idea that gender differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable."); Loren D. Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, 41 SOC. SCI. RES. 735, 748 (2012) (explaining flaws in 59 studies conducted on same-sex parenting, including the involvement of small, non-random, convenience samples, and concluding that the generalized claim of "no difference" was "not empirically warranted"); D. Paul Sullins, *Emotional Problems Among Children with Same-Sex Parents: Difference by Definition*, 7(2) BRITISH J. OF EDUC., SOC'Y & BEHAV. SCI., 114 (2015) ("The primary benefit of marriage for children ... may not be that it tends to present them with improved parents (more stable, financially affluent, etc., although it does do this), but that it presents them with their own parents.")

In short, marriage

> "reinforces the idea that the union of husband and wife is (as a rule and ideal) the most appropriate environment for the bearing and rearing of children.... If same-sex partnerships were recognized as marriages, however, that ideal would be abolished from our law: no civil institution would any longer reinforce the notion that children need both a mother and father; that men and women on average bring different gifts to the parenting enterprise; and that boys and girls need and tend to benefit from fathers and mothers in different ways."

Sherif Girgis, Robert P George, & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 262-63 (Winter 2011). Rightly, these cases "are about the welfare of American children," *Baskin* v. *Bogan*, 766 F.3d 648, 654 (7th Cir. 2014), with the States' focus properly including the best environment for child bearing and upbringing. *See, e.g.*, Michigan Marriage Amendment ("To secure and preserve the benefits of marriage for our society and *for future generations of children*..." (emphasis added)).

Even if a State allows the adoption of children by two people of the same sex, or provides other rights or benefits to them, that does not negate its judgment that mothers and fathers joined in marriage represent the ideal environment for raising children, and therefore continue to warrant the distinctive and preferential name of "marriage."[7] The moral and

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[7] "That the State does not preclude different types of families from raising children does not mean that it must view them all

social good of children who are born of such unions is advanced when government supports, encourages, and prefers their placement within a family structure headed by one man and one woman. The State can legitimately encourage, promote, and support the union of one man and one woman as an ideal environment for children without at the same time encouraging, promoting and supporting other relationships.[8]

Put another way, it is reasonable for the government to view the union of one man and one woman united in marriage as the *preferred* environment for the bearing and upbringing of children, even if, as it happens, some children are born and raised in non-marital contexts as well (e.g., by single persons, or by persons in same-sex relationships). It bears emphasizing that a government preference for husband-wife unions as the optimal environment in which to raise children is

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as equally optimal and equally deserving of State endorsement and support.... Thus, the Legislature may rationally permit adoption by same-sex couples yet harbor reservations as to whether parenthood by same-sex couples should be affirmatively encouraged to the same extent as parenthood by the heterosexual couple whose union produced the child." *Jackson* v. *Abercrombie*, 884 F.Supp.2d 1065, 1116 (D. Haw. 2012) (quoting *Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941, 1000-01 (Mass. 2003) (Cordy, J., dissenting) (internal quotation marks and brackets omitted)).

[8] *Jackson*, 884 F.Supp.2d at 1116 ("[I]t is not irrational for the state to provide support for the parenthood of same-sex couples through the civil unions law, but not to the same extent or in the same manner it encourages parenthood by opposite-sex couples.").

a judgment about *marriage* as the only institution that serves to connect children with their father and mother together in a stable home. It is not a judgment about the dignity or worth of any *person*, married or not. *See, e.g.*, *Lawrence* v. *Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring in the judgment) ("[R]easons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.").[9] It also is not a judgment about the parental competency of any one person over another.[10]

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[9] Some advocates and even some lower courts have caricatured a moral preference for *marital unions* as disapproval of *persons* with same-sex attractions. This is as misleading and inaccurate as saying that the current marriage laws of 50 states disparage or undermine the dignity of single persons, or of persons who practice polygamy, as opposed to simply representing a moral preference for marriage. First, the current debate specifically concerns the meaning of marriage and the proposal to redefine marriage, not the phenomenon of same-sex attraction and the persons who experience such attraction. For this reason, the suggestion that opposition to the redefinition of marriage is equivalent to an animus against people who experience same-sex attraction is particularly offensive and plainly wrong. Second, the Church's pastoral care of persons who are sexually attracted solely or predominantly to persons of the same sex is informed not only by its teaching about the proper use of the sexual faculty, but by its conviction that each and every human person, regardless of sexual inclination, has a dignity and worth that derives from his or her Creator. Thus, the further suggestion that opposition to homosexual *conduct* is simply animus against *persons* who engage in such conduct is also erroneous and offensive.

[10] Nor does the definition of marriage as the union of one man and one woman have anything to do with sexual orientation *per se*. "What we have come to call the gay marriage debate is not directly about homosexuality, but about marriage. It is not

Given the procreative capacity of different-sex couples, the basic right of a child to be raised by his or her father and mother together, and the interest in encouraging homes with a mother and father, marriage, as the union of one man and one woman, has a societal value that is absent from other interpersonal relationships.

### B. When It Uniquely Reinforces the Union of One Man and One Woman, the Law Furthers the Interests and Well-Being of Mothers and Fathers.

By encouraging and supporting an enduring bond between mothers and fathers, the government furthers the interests of not only children, but their parents. The practical reality is that, absent such a bond, *one* parent is left as the primary economic, emotional, and developmental support for the child. That, in turn, places an increased burden on the custodial parent and other (including governmental) resources.

This is an interest of exceptional importance in light of recent demographic data. More than a quarter (28.1 percent) of all children in the United States under 21 years of age live with only *one* parent. U.S. CENSUS BUREAU, *Custodial Mothers and Fathers and Their Child Support: 2011* at 1 (Oct.

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about whom to let marry, but about what marriage is." Sherif Girgis, Robert P. George, & Ryan T. Anderson, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE, at 1 (New York: Encounter Books, 2012). The claim, therefore, that "these cases are about discrimination against the small homosexual minority in the United States," *Baskin* v. *Bogan*, 766 F.3d at 654, is simply false.

2013), www.census.gov/prod/2013pubs/p60-246.pdf. In the vast majority of cases, the sole custodial parent is the mother. *Id.* ("About 18.3 percent of custodial parents were fathers"). Government support and encouragement of marriage between mothers and fathers therefore serves the vital interest of reducing, or preventing still further increases in, the already-high incidence of single parenthood (usually single motherhood) and the consequent burdens that it places upon both the custodial parent and the public fisc.[11]

The government's support and encouragement is particularly helpful in countering the negative personal and societal consequences specific to fatherlessness.[12] To be sure, marriage serves to connect children to both their mother and their

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[11] The poverty rate for single-parent families (28.9 percent) is almost *twice* that of the general population (15 percent). *Custodial Mothers and Fathers and Their Child Support*, at 4. The distinct economic benefits for both men and women in intact marriages and the overall economic significance of family structure continue to be acknowledged. *E.g.*, *see* Robert I. Lerman & W. Bradford Wilcox, *For Richer, For Poorer: How Family Structures Economic Success in America*, 43 (2014), http://www.aei.org/wp-content/uploads/2014/10/IFS-ForRicherForPoorer-Final_Web.pdf ("Both men and especially women enjoy higher family income when they get and stay married.").

[12] For example, there is a documented link between low-quality or absent fathers and the higher incidence of delinquent behavior in boys, teenage pregnancy in girls, and depression in both boys and girls. *See* W. Bradford Wilcox, *The Distinct, Positive Impact of a Good Dad*, THE ATLANTIC, June 14, 2013, http://www.theatlantic.com/sexes/archive/2013/06/the-distinct-positive-impact-of-a-good-dad/276874/.

father, but it plays an especially important role in joining *men* with their children and with the mother of their children in the shared task of parenting. The physical presence and identity of the mother of a child is assured at birth without the assistance of the law; but the assistance of the law is helpful, if not indispensable, in assuring the presence and identity of the father.

## II. The Legal Definition of Marriage as the Union of One Man and One Woman Is Not Based on Hatred, Bigotry, or "Animus" or Any Other Impermissible Purpose or Classification.

### A. When It Draws Distinctions Based on Conduct Rather Than Status or Inclination, the Law Does Not Reflect Hatred, Bigotry, or "Animus."

When the government treats persons differently because of their race, sex, or national origin, it discriminates on the basis of an immutable trait identifiable from conception or birth.[13] In contrast, a decision to participate in a same-sex relationship is not a trait, but a species of conduct. *See High Tech*

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[13] This court has recognized principally three classifications (race, alienage, and national origin) as suspect, and two (sex and illegitimacy) as quasi-suspect for purposes of triggering, respectively, strict or intermediate scrutiny. *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967) (race); *Graham* v. *Richardson*, 403 U.S. 365, 371-72 (1971) (alienage); *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944) (national origin); *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 723-24 (1982) (sex); *Lalli* v. *Lalli*, 439 U.S. 259, 265 (1978) (illegitimacy). One's choice of a sexual partner falls into none of these categories.

*Gays* v. *Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (stating that a decision to engage in homosexual relations is "not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage"); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("Members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature"). With this distinction in mind, this Court has recognized that a finding of a suspect or quasi-suspect class for equal protection purposes is simply inappropriate when the distinguishing characteristic is a product of "voluntary action." *Plyler* v. *Doe*, 457 U.S. 202, 219 n.19 (1982).

While same-sex sexual *conduct* may be "closely correlated" with a homosexual *inclination*, *see Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring in the judgment), the correlation is by no means absolute, and what separates the two is critical both legally and morally—the exercise of a responsible human will.

The Court should maintain this venerable distinction between inclination and overt conduct because it pervades the Anglo-American legal tradition, applicable to but extending far beyond discussions of sexuality. In general, though the government may legally disadvantage all manner of conduct, the Constitution forbids it to do the same to a person's status, belief, or inclination.[14]

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[14] *See, e.g.*, *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 106-

Declining to accord a sexual relationship between two men or two women the benefits of marriage is not a reflection of bias or animus of any kind. Rather, it is a common sense reflection of the fact that such relationships do not result in the birth of children, or establish households where a child will be raised by its birth mother and father.

### B. When It Treats One Type of Conduct Differently from Conduct with Very Different Practical Consequences, the Law Does Not Reflect Hatred, Bigotry, or "Animus."

The government can lawfully treat conduct having one set of consequences differently than conduct having a different set of consequences. All of the criminal law and most of the civil law does precisely that. When the government promotes and encourages one type of conduct, it generally incurs no obligation to promote or encourage any other conduct.

Because, as we have demonstrated, marriage as between a man and woman advances interests that

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07 (2007) (noting that, at common law, mere attempt to commit an unlawful act was not a crime absent "some open deed"); *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990) (contrasting strong protection against government regulation based on religious status or belief with rational basis protection that generally applies to religious conduct); *Robinson* v. *California*, 370 U.S. 660, 667 (1962) (holding that criminal punishment for "being" a drug addict, without the behavior of taking drugs, violates the Eighth Amendment); *Doe* v. *City of Lafayette*, 377 F.3d 757, 765 (7th Cir. 2004) ("the government cannot regulate mere thought, unaccompanied by conduct") (citing *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 67-68 (1973)).

same-sex relationships do not, the State is not required to treat them as equivalent. *See Johnson* v. *Robison*, 415 U.S. 361, 383 (1974) (stating that a classification will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not"). Here, changing marriage to include two people of the same sex would not advance the interests we have identified as supporting man-woman marriage, because same-sex relationships by their nature do not cause children to be born. Likewise, the government's interest in promoting and encouraging households in which children are raised by their biological mother and father together is not furthered by promoting and encouraging same-sex relationships. Because opposite-sex and same-sex relationships pose different consequences, the two are not similarly situated.

Those who advocate treating same-sex relationships like opposite-sex unions claim that they are denied a benefit that others enjoy. What is the harm, they argue, to providing the benefits of marriage to persons of the same sex? But if that claim were valid—that is, if the mere failure to accord a benefit were enough to justify a judicial redrawing of legislative classifications as to who is and who is not an eligible beneficiary—then the courts would be quite busy indeed. For in that case, *every* classification would necessarily implode upon a mere showing that harm to some persons would be avoided if they were made eligible for some benefit for which the legislature has not deemed them eligible. It can hardly be claimed, given the stated purpose of government-conferred marital benefits, that the

government acts arbitrarily or unlawfully in encouraging an enduring bond between mothers and fathers when *they alone* are capable of having children and, as birth parents, raising them together.

### C. When It Reinforces Norms That Happen to Correspond with Religious Beliefs, the Law Does Not Impermissibly Endorse Religion.

It is hard to recall any major public policy debate in American history that has not been informed by religious and moral viewpoints, against which different or opposing religious and moral viewpoints are often arrayed. As this Court has observed, "[w]e are a religious people." *Lynch* v. *Donnelly*, 465 U.S. 668, 675 (1984) (quoting *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952)). If the religious viewpoints of the people were deemed "out of bounds" in public policy—falling below even a minimum standard of rationality—then the history of our Nation would have been much different (and worse).

The social and political movements that led to the abolition of slavery and the subsequent adoption of civil rights laws, for example, were all informed by religious motivations and moral viewpoints. Indeed, every January, the Nation celebrates the birthday of a minister, a leading figure in the civil rights movement, who drew upon decidedly religious and moral notions of human dignity in urging the reform of American law.

Thus, it is well established that a law is not constitutionally impermissible because it overlaps with a religious teaching. This Court has squarely

and repeatedly rejected any claim that "a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'" *Harris* v. *McRae*, 448 U.S. 297, 319 (1980) (quoting *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961)). The government may enact laws that "reflect[] ... 'traditionalist' values" toward an issue without being found to have adopted as laws "the views of any particular religion." *Harris*, 448 U.S. at 319.

Moreover, the arguments made in favor of *redefining* marriage to include same-sex relationships are *themselves* shaped by religious and moral arguments and viewpoints, albeit (in our view) erroneous ones. Thus, if the policy arguments made by those favoring marriage are ruled "out of bounds" simply because they may be religiously and morally motivated, then those religious and moral claims favoring the redefinition of marriage are equally impermissible. It may be that a voter's or legislator's view in favor of redefining marriage is based on his religious principles, just as in *Harris* the Court recognized that a decision to seek an abortion may also "be a product of ... religious beliefs" within certain belief systems. *Harris*, 448 U.S. at 319. Correspondingly, when a decision against marriage redefinition (or regulating abortion) is informed by a voter's or legislator's faith, it is no more a government enforcement or imposition of that faith, and no less permissible. "[R]eligious discussion, association, or political participation" may not legitimately be placed "in a status less preferred than rights of discussion, association, and political participation generally." *McDaniel* v. *Paty*, 435 U.S.

618, 640 (1978) (Brennan, J., concurring in the judgment). In short, religious and moral considerations—sometimes explicit, sometimes implicit—are interwoven into the fabric of the current and unfolding debate about marriage, on all sides of the debate, legitimately and unavoidably so.

It is a mistake to characterize laws defining marriage as the union of one man and one woman as somehow embodying a purely religious viewpoint over against a purely secular one. This Court should therefore reject any argument that it is irrational or otherwise unconstitutional for government to define marriage as between one man and one woman, simply because that decision corresponds with one or another religious or moral view.

### D. When It Declines to Specially Reinforce a Particular Relationship Between Persons, the Law Does Not Thereby "Ban" That Relationship or Make It "Illegal."

When States endorse, support, and promote the union of one man and one woman as uniquely valuable by conferring on them benefits and privileges, they do not thereby "ban" other interpersonal relationships or conduct.

In striking down a ban on homosexual acts, this Court has cautioned expressly that a duty of government non-interference with such acts does *not* mean that the government has a duty, constitutional or otherwise, to support or encourage same-sex relationships, whether by calling them "marriage" or otherwise. *Lawrence*, 539 U.S. at 578 (noting that

case involving a criminal prohibition of homosexual conduct "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").[15]

This is fully consistent with many other decisions of this Court, which recognize that the constitutional protection of private conduct from government interference does not imply a constitutional duty to endorse or promote that conduct. For example, this Court has ruled that there are certain types of private conduct that states may not *ban*, such as abortion before viability. *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992). But that prohibition has never translated into a constitutional requirement that states *support* or *encourage* abortion. Quite the contrary, states may encourage childbirth, and it is well settled that when they do so they incur no duty to encourage abortion. *Harris* v. *McRae*, 448 U.S. 297 (1980); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Beal* v. *Doe*, 432 U.S. 438 (1977).

In short, *Casey* and *Lawrence* involved a right (albeit not absolute) to keep government's hands *off* of certain personal conduct—in one case, whether to have an abortion, in the other, whether to engage in homosexual relationships. On the other hand, this

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[15] *See Jackson* v. *Abercrombie*, 884 F.Supp.2d at 1086 ("[T]he court in *Lawrence* implicitly recognized that it is one thing to conclude that criminalizing private, consensual homosexual conduct between adults violates due process; it is entirely another matter to conclude that the constitution requires the redefinition of the institution of marriage to include same sex couples.") (quoting *Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407, 513 (Conn. 2008) (Borden, J., dissenting)).

Court has never intimated that this "right to be let alone"—the right to government non-interference with constitutionally protected private conduct—triggers a right to affirmative government support. The government is not somehow constitutionally required to place its *imprimatur* on personal conduct with which it may not constitutionally *interfere*.

Under this Court's decision in *Lawrence*, two people of the same sex may enter into sexual relationships without fear of criminal penalty. Indeed, they may choose to describe those relationships as "marriage" if they wish—for example, if their religious tradition considers it so, even if others would not. That does not mean, however, that same-sex sexual relationships thereby become entitled to the government's imprimatur or encouragement, or to government-sponsored marital benefits.

## III. A Holding That the Unique Affirmation of Man-Woman Marriage Is Grounded in Hatred, Bigotry, or "Animus" Would Needlessly Create Church-State Conflict for Generations to Come.

Even proponents of redefining marriage have recognized that if the Court decides to invalidate these State marriage laws, "it should make clear that it is not thereby finding that the laws rest on animus in the sense of hatred or malice."[16] While such proponents believe that religious liberty can somehow

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[16] Brief of Laycock et al. as Amici Curiae in Support of Petitioners at 8, *Obergefell* v. *Hodges*, Nos. 14-556, 14-462, 14-571, 14-574 (U.S. Mar. 6, 2015).

be protected at the same time that marriage is redefined in the civil law, the present *amicus* is much less sanguine about this prospect.

One need only look back a few decades at the Court's decision in *Roe* v. *Wade*, 410 U.S. 113 (1973), which announced a constitutional right to abortion. Justice Ginsburg has recently observed that the *Roe* judgment "moved too far too fast."[17] And *Roe* has led to decades of litigation in which the claimed abortion right is pitted against other constitutional rights (e.g., paternal rights, parental rights involving pregnant minors, and conscience rights).

Although a decision relying on the Constitution to redefine civil marriage would end "the democratic processes begun in the States," *DeBoer* v. *Snyder*, 772 F.3d 388, 396 (6th Cir. 2014), it would not end the debate in the culture, and certainly not in the courts. Rather, it would generate a panoply of church-state litigation for decades to come. Indeed, the potential for conflict embroiling the federal courts may be even greater than abortion because marital status is such a pervasive feature of the civil law.

The Catholic Church's teaching on marriage is deeply embedded in its understanding of God and the

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[17] Debra Cassens Weiss, *Justice Ginsburg:* Roe *v.* Wade *Decision Came Too Soon*, A.B.A. J., Feb. 13, 2012, http://www.abajournal.com/news/article/justice_ginsburg_roe_v._wade_decision_came_too_soon ("Another alternative, she said, was to strike down the Texas law before the court, without finding a right to privacy that overturned abortion bans nationwide. 'Things might have turned out differently if the court had been more restrained,' she said.").

human person. If this Court were to declare Church teaching to be mere bigotry, then the conflict between constitutional rights to act on such religious beliefs—i.e., the rights to free exercise, speech, and association—versus a newly created constitutional right of two people of the same sex to civil marriage will never cease.

The disputes that have arisen so far provide a glimpse of what would come on a far larger scale if marriage were redefined by this Court.[18] Individuals, either directly or as principals of closely-held businesses, have already encountered government obstacles to entering or remaining in their chosen profession[19] or in the marketplace, because of their support for marriage as the union of one man and one woman.[20] Judges have been told that, if they perform

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[18] *See* Brief of the General Conference of Seventh-Day Adventists & the Becket Fund for Religious Liberty as Amici Curiae in Support of Neither Party at Part II.D., *Obergefell* v. *Hodges*, Nos. 14-556, 14-562, 14-571, 14-574 (U.S. Mar. 2015); Brief of Laycock, *supra* note 16, at Part II.C.; SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson, eds., 2008).

[19] *See Ward* v. *Wilbanks*, No. 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010) (upholding dismissal from academic program of counseling trainee based on her religious objection to affirming potential counselee's same-sex relationship), *rev'd*, 667 F.3d 727 (6th Cir. 2012).

[20] *Elane Photography, LLC* v. *Willock*, 309 P.3d 53 (N.M. 2013) (affirming decision that wedding photographer's religious objection to photographing same-sex "commitment ceremony" must yield to New Mexico law forbidding discrimination on the basis of sexual orientation; a concurring judge stated that this is "the price of citizenship"), *cert. denied*, 134 S. Ct. 1787 (2014).

any wedding ceremony at all, they cannot refuse to perform a same-sex ceremony.[21] Religiously-affiliated nonprofit organizations have had to cease providing adoption and foster care services for vulnerable children because of the redefinition of marriage.[22]

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*See also State* v. *Arlene's Flowers, Inc.*, No. 13-2-00871-5 (Wash. Super. Ct. Feb. 18, 2015); *Craig* v. *Masterpiece Cakeshop, Inc.*, No. CR 2013-0008 (Colo. Civil Rights Comm'n May 30, 2014). In a case settled before judgment, Catholic owners of a bed and breakfast in Vermont were charged with violating Vermont's Fair Housing and Public Accommodations Act for allegedly not hosting a "wedding" reception for two persons of the same sex. Ultimately, the owners agreed to pay a fine and not to host any wedding receptions. *See* ACLU Press Release (Aug. 23, 2012), http://www.aclu.org/lgbt-rights/vermont-resort-pay-fine-and-revise-policies-settle-discrimination-lawsuit-lesbian-couple.

[21] Ariz. Sup. Ct. Judicial Ethics Advisory Comm., Revised Advisory Op. 15-01, *Judicial Obligation to Perform Same-Sex Marriages* (Mar. 9, 2015). The opinion states that "a judge who chooses to perform marriages may not discriminate between marriages based on the judge's opposition to the concept of same-sex marriage." The restriction applies even to judges who only perform marriages for friends and relatives. *Arizona Judges Can't Do Only Opposite-Sex Marriages, Ethics Opinion Says*, ARIZ. CAPITOL TIMES, Mar. 16, 2015, http://azcapitoltimes.com/news/2015/03/16/arizona-judges-cant-do-only-opposite-sex-marriages-ethics-opinion-says/ (providing examples of restrictions on judges from other states).

[22] After Massachusetts redefined marriage, Catholic Charities of Boston was forced to end its adoption work rather than comply with a state law requiring that same-sex couples be allowed to adopt children. *See* Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, Mar. 11, 2006, at A1. After the District of Columbia redefined marriage, government officials informed Catholic Charities of the Archdiocese of Washington that it no longer would be allowed to continue to

Further, if the Court construes the Constitution to require government affirmation of same-sex relationships as marriage, it would seem a short step to requiring such affirmation of private actors as a condition of their receiving government contracts, participating in public programs, or being eligible for tax exemption.[23]

In short order, those who disagree with the government's moral assessment of such relationships

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provide foster care and publicly-funded adoption programs in the District of Columbia. Joseph R. LaPlante, *Tough Times for Catholic Adoption Agencies*, OSV NEWSWEEKLY, May 7, 2014, https://www.osv.com/OSVNewsweekly/ByIssue/Article/TabId/735/ArtMID/13636/ArticleID/14666/Tough-times-for-Catholic-adoption-agencies.aspx.

[23] *See, e.g., Bob Jones Univ.* v. *Simon*, 416 U.S. 725 (1974). Further, such affirmation could be required in order to remain accredited by agencies whose accreditation enables institutions to establish eligibility to participate in the Federal student financial assistance programs administered by the Department of Education under Title IV of the Higher Education Act of 1965. *See* U.S. DEP'T OF EDUC., Accreditation in the United States, http://www2.ed.gov/admins/finaid/accred/accreditation_pg9.html In an example of what may lie ahead for religious colleges and universities, in July 2014, the president of Gordon College (a Christian university) signed a coalition letter to President Barack Obama requesting inclusion of language that would exempt religious organizations from an imminent executive order barring federal contractors from discriminating on the bases of sexual orientation and gender identity. In September 2014, the New England Association of Schools and Colleges gave the college a year to report on how its non-discrimination policies met the organization's standards for accreditation. Mary Moore, *Accreditation Board Gives Gordon College a Year to Review Policy on Homosexuality*, BOSTON BUS. J., Sept. 25, 2014, http://www.bizjournals.com/boston/news/2014/09/25/accreditation-board-gives-gordon-college-a-year-to.html.

will find themselves increasingly marginalized and denied equal participation in American public life and benefits. This intense pressure would not lead to their capitulation, but instead to wide-ranging, long-enduring—and entirely needless—legal conflict between Church and State.

This Court stands at a crossroads. It may create a durable engine for that conflict, by enshrining in constitutional jurisprudence a mischaracterization of the beliefs of millions now alive and billions gone before as bigotry, and precluding any reasonable accommodations. Alternatively, it may leave the matter to the democratic process at the state level, where there is at least some hope for durable peace, rather than the certainty of durable conflict: where, regardless of the result, the consent of the governed is more nearly assured; where any course corrections identified through experience can be made more readily; and where conflicting interests can reach reasonable compromises. In the strongest possible terms, we urge this Court to take the latter course.

## CONCLUSION

Encouraging procreation in stable households headed by a mother and father is not only a rational governmental decision, but serves an interest of the highest order. No institution other than marriage joins a man and a woman together in a permanent and exclusive way and unites them to any children born of their union. No other institution ensures that children will have the opportunity to be raised by both a mother and father. The devaluation and loss of such families as the primary environment for raising children is a significant societal ill. Laws that strongly encourage and promote the union of one man and one woman in marriage are an important part of the remedy for this national problem. It would be a grave disservice to the Nation, and a serious misreading of the Constitution, to strike down such laws.

For the foregoing reasons, the marriage laws challenged in these cases should be upheld, and the judgments of the Court of Appeals in each case should be affirmed.

Respectfully submitted,

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